No. 50007-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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GEOFFREY A. PARKER, as an individual and on behalf of his marital community,

Respondent,

v.

PARKVIEW TRAILS, LLC, a dissolved limited liability company,

Appellant,

v.

EDWARD B. GREER, as an individual and on behalf of his marital community, and PHUONG MINH PARKER, as an individual and on behalf of her marital community,

Third-Party Respondents.

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# CORRECTED
# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This appeal arises from plaintiff/respondent Geoffrey Parker and third-party defendant/third-party respondent Phuong Minh Parker's successful motion for summary judgment, which quieted title to property owned by Mr. Parker via the removal of a deed of trust that had secured a long-expired, unenforceable contract. The contract in question was part of a land development deal entered into between third-party defendant/third-party respondent Edward Greer and appellant Parkview Trails, LLC (this contract, as amended, is the "PSA"): in 2001, Mr. Greer sold Parkview Trails property on which Parkview Trails built a residential subdivision. As part of the land development deal, Mr. Greer caused to be executed a deed of trust (the "Deed of Trust") on a separate piece of property he owned (the "Property") to ensure his performance under the PSA.

Although Parkview Trails and Mr. Greer dispute whether Mr. Greer fully performed under the PSA, it is undisputed that in the early 2000s the parties exchanged written letters about Parkview Trails' allegation that Mr. Greer had not performed under the PSA. This conversation culminated in a 2005 letter from Parkview Trails to Mr. Greer's counsel in which Parkview Trails accused Mr. Greer of

nonperformance, detailed more than $1,000,000 in costs and expenses that Parkview Trails had allegedly incurred as a result, and stated, "Please provide reimbursement as soon as possible and I will make arrangements to release the subject deed of Trust." Mr. Greer did not pay the amount demanded; Parkview Trails did not release the Deed of Trust, and Parkview Trails was administratively dissolved in 2007.

In 2014, nine years after Parkview Trails accused Mr. Greer of breach and demanded damages, Mr. Greer sold the Property to Mr. Parker. When Mr. Parker purchased the Property, the title company removed Parkview Trails' Deed of Trust and insured over it. Yet a year later, when Mr. Parker wished to sell the Property, the title company refused to remove the Deed of Trust. Since Parkview Trails no longer existed, Mr. Parker approached Michael DeFrees (who had been Parkview Trails' sole owner) and asked him to release the unenforceable, expired Deed of Trust. Mr. DeFrees refused, leaving Mr. Parker no choice but to file this action—a quiet-title action seeking removal of the long-unenforceable Deed of Trust.

Only after Mr. Parker filed the quiet-title action did Parkview Trails become reinstated as an LLC, raise its expired claim for breach of

contract against Mr. Greer, and seek to foreclose on the Deed of Trust. Because Parkview Trails raised its claims long after the six-year statute of limitations for breach of contract expired, the Parkers moved for summary judgment on (1) their claim to quiet title, and (2) Parkview Trails' counter- and cross-claims to foreclose on the Property. The Superior Court granted the Parkers' summary judgment motion.

In granting the Parkers' summary judgment motion, the Superior Court correctly recognized that Mr. DeFrees's 2005 letter to Mr. Greer definitively established that by no later than 2005, Parkview Trails knew all facts necessary to sue Mr. Greer for breach of contract. Accordingly, under well-established Washington law the statute of limitations started to run no later than 2005. Under RCW 4.16.040(1), then, the statute of limitations on Parkview Trails' breach-of-contract claim expired no later than 2011. And once the underlying contract expired, the Deed of Trust had no enforceable obligation to secure, such that under RCW 7.28.300 Mr. Parker was entitled to quiet title to the Property.

Parkview Trails has made and continues to make a number of arguments as to why the Superior Court's ruling was in error, but none of its arguments change the fundamental facts, which are undisputed:

Parkview Trails informed Mr. Greer that he was in breach of the PSA no later than 2005, demanded payment for the damages it allegedly occurred as a result, and then—receiving no payment and no word back from Mr. Greer—did nothing. Even if the PSA was breached, as the Parkers assumed for the purpose of summary judgment only, Washington law does not allow a plaintiff to sleep on its rights. The Superior Court recognized this and correctly granted the Parkers summary judgment.

As to Parkview Trails' motion for reconsideration and motion to compel production of documents and responses to interrogatories, the Superior Court recognized them for what they were: red herrings in a futile attempt to avoid summary judgment. Nothing in either motion changed (or raised possible evidence that could change) the fact that the statute of limitations for breach of contract started to run no later than 2005.

The motion for reconsideration argued that Parkview Trails had "newly discovered evidence" about Mr. Greer's breach of the Deed of Trust. This argument fails because the "newly discovered evidence" was not new—it was available throughout the litigation as part of Clark County's online property information website—and because, as a matter of

law, nothing it raised altered the fact that after 2011 the Deed of Trust was no longer enforceable.

Similarly, Parkview Trails' CR 56(f) motion and motion to compel production of documents and responses to interrogatories both sought additional discovery related to Mr. Parker's alleged acts surrounding his purchase of the Property in 2014.[1] But anything Mr. Parker did or did not do in 2014 is simply irrelevant to the fact that the underlying contract expired in 2011, making the Deed of Trust unenforceable after 2011. Parkview Trails cites no authority under Washington law that any acts (1) taken by a third person, not party to a contract, (2) several years after the contract expired can toll the statute of limitations for breach of contract. Whatever Mr. Parker did or did not do in 2014 is simply irrelevant to the fact that Parkview Trails' claim for breach of the PSA accrued in 2005 and expired in 2011. Thus, the Superior Court was correct when it did not grant Parkview Trails' motion for reconsideration[2]

[1] In its brief, Parkview Trails also points to evidence that it would or could have obtained from Mr. Greer; this argument is moot, however, since Parkview Trails did not issue discovery requests to Mr. Greer until after the Superior Court had issued its oral ruling on summary judgment.

[2] The Superior Court did not rule on Parkview Trails' motion for reconsideration.

and denied its motion to compel production of documents and responses to interrogatories.

For the foregoing reasons, the Parkers ask the Court of Appeals to affirm the Superior Court's decision in the entirety.

## II. RESTATEMENT OF ISSUES PERTAINING TO PARKVIEW TRAILS' ASSIGNMENTS OF ERROR

A. Did the Superior Court err in holding that the statute of limitations for breach of the PSA began to run no later than 2005, even though undisputed evidence showed that (1) in 2005 Parkview Trails had knowledge of all facts needed to apply to the court for relief; and (2) in 2005 Parkview Trails demanded payment under the PSA from the party allegedly in breach?

B. Was the Superior Court's failure to grant Parkview Trails' motion for reconsideration based on "newly discovered evidence" manifestly unreasonable even though (1) the "newly discovered evidence" was available throughout the entirety of the litigation (and earlier) from Clark County's online property information records and so was not "new"; (2) the "newly discovered evidence" did not affect the date on which the statute of limitations began to run on breach of the PSA; and (3) even if

the Deed of Trust were enforceable, the "newly discovered evidence" did not establish a breach of the Deed of Trust giving Parkview Trails the right to foreclose on the Property separate and independent from the PSA?

C. Did the Superior Court abuse its discretion in granting the Parkers' motion for summary judgment over Parkview Trails' CR 56(f) opposition, even though (1) Parkview Trails articulated no good reason for its failure to request discovery during the prior six months that the litigation was pending; and (2) Parkview Trails identified no legal authority that the affirmative defenses it alleged, even if proved, would toll the statute of limitations on breach of the PSA?

D. Did the Superior Court abuse its discretion by denying Parkview Trails' motion to compel production of documents and responses to interrogatories even though the additional evidence sought by Parkview Trails centered on Mr. Parker's purchase of the Property, which occurred three years after the statute of limitations on breach of the PSA expired, and Parkview Trails introduced no legal authority showing that a statute of limitations, once expired, can be "brought back to life" by a third party's conduct?

## III. STATEMENT OF THE CASE: FACTUAL BACKGROUND

### A. Mr. Parker's Property: The Subject of the Quiet-Title Action.

Mr. Parker is the owner of the Property, a parcel of land in Clark County, Washington, that is commonly identified as tax parcel number 228513-000. A legal description of the Property is attached as Exhibit A to Mr. Parker's complaint.[3] Mr. Parker acquired the Property in 2014 from Mr. Greer.

### B. The 2001 Land Development Transaction Between Parkview Trails and Mr. Greer.

Parkview Trails (a corporation wholly owned by Mr. DeFrees that was dissolved in 2007 and reinstated in 2015) and Mr. Greer engaged in a land development transaction in approximately 2001. As part of that deal, Mr. Greer sold land (not the Property) to Parkview Trails (the "Transaction Property").[4] Mr. Greer had purchased the Transaction Property with the intent of selling it to a real estate developer; he thus acquired the Transaction Property, obtained preliminary subdivision approval, and then sold the Transaction Property to two different builders,

[3] CP 6.

[4] CP 54-55 (¶ 2).

which would build the actual subdivision.[5] One of the builders was Parkview Trails.[6]

At the time of the transaction, it was known to all parties that the Transaction Property had wetlands on it.[7] Because Parkview Trails was concerned about obtaining wetland permits before construction of improvements in the subdivision could start, it negotiated a deal with Mr. Greer in which it was Mr. Greer's responsibility to obtain wetland fill permits.[8] Accordingly, Mr. Greer obtained initial approval from the United States Army Corps of Engineers ("USACE") to fill up to 1.58 acres of wetlands. The USACE approval was later amended to authorize fill up to .88 acre of wetlands.[9]

Under Addendum B of the PSA, Mr. Greer was responsible for obtaining "written consent(s) for construction of the improvements for the Parkview Trails Planned Unit Development . . . as presently approved by

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[5] CP 55 (¶ 3).

[6] *Id.*

[7] CP 55 (¶ 4).

[8] *Id.*

[9] *Id.*

the City of Battle Ground (the 'Consent(s)')."[10] Addendum B specified that "Greer shall have until May 1, 2002 to obtain the Consent(s) at Greer's sole cost and expense"; this date was later extended to July 1, 2002, in an Amendment to Addendum B.[11] Although the Property was not part of the Parkview Trails/Greer development deal, Mr. Greer executed the Deed of Trust against the Property in favor of Parkview Trails, which was recorded against the Property on September 19, 2001. He did so to secure his obligation to obtain the Consents and pay potential traffic mitigation costs under Addendum B.

Ultimately, Parkview Trails and Mr. Greer disagreed about Mr. Greer's obligations under Addendum B.[12] Mr. Greer believes he met his obligation under Addendum B; Parkview Trails believes he did not.[13] Accordingly, the parties—and then counsel for the parties—exchanged letters in 2002 about Mr. Greer's obligation to obtain permits and the related obligation of Parkview Trails to: (1) release funds held back in

[10] CP 55 (¶ 5); CP 57-60.

[11] CP 55 (¶ 6); CP 57-60; CP 61.

[12] CP 55-56 (¶ 7).

[13] For purposes of this summary judgment to quiet title to the Property, whether Mr. Greer did or did not fully perform under Addendum B is immaterial.

escrow until Mr. Greer had satisfied Addendum B, and (2) release the Deed of Trust on the Property that also secured Mr. Greer's performance under Addendum B.[14]

Mr. Greer and Parkview Trails never reached agreement on the parameters of Mr. Greer's obligation under Addendum B.[15] Parkview Trails recorded final plats for several phases of the subdivision and began building houses.[16] During construction, Parkview Trails filled more wetlands than was allowed under the permit that Mr. Greer had obtained.[17] Although both USACE and the City of Battle Ground contacted Parkview Trails about the violation, Parkview Trails never fixed the violation, and both USACE and the City of Battle Ground stopped pursuing Parkview Trails about the violation.[18] Parkview Trails was able to complete the subdivision and sell houses without obtaining additional permits or remedying any of its violations.[19]

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[14] CP 55-56 (¶ 7); CP 62; CP 63; CP 64-65.

[15] CP 56 (¶ 8).

[16] CP 56 (¶ 9).

[17] CP 56 (¶ 10).

[18] CP 56 (¶ 11).

[19] CP 56 (¶ 12).

### C. The 2005 Demand.

After remaining silent for approximately three years, Mr. Greer again requested release of the Deed of Trust on the Property. On September 30, 2005, Mr. DeFrees (on behalf of Parkview Trails) wrote to counsel for Mr. Greer and explicitly stated that Parkview Trails had incurred costs and expenses of more than $1,000,000 as a result of Mr. Greer's failure to perform under Addendum B, demanded reimbursement for the costs and expenses incurred, and stated, "Please provide reimbursement as soon as possible and I will make arrangements to release the subject deed of Trust."[20]

Mr. Greer did not respond, and the Deed of Trust remained on the Property.

### D. Mr. Parker's Lawsuit to Quiet Title to the Property.

Mr. Parker acquired the Property on January 14, 2014, from Mr. Greer.[21] As part of this transaction, the title company removed the Deed of Trust and insured over it.[22] Yet when Mr. Parker decided to sell the Property in 2015, he located a buyer, and title research was conducted

[20] CP 56 (¶ 13); CP 66-67.

[21] CP 69 (¶ 2).

[22] CP 70 (¶ 3).

as part of the sale process, the Deed of Trust resurfaced as an obligation on the Property.[23] The title company would not insure over the Deed of Trust, as it had previously done.[24] Accordingly, Mr. Parker had no choice but to initiate the underlying action to quiet title and obtain a judicial declaration that Parkview Trails has no legal interest in the Property.

Although Parkview Trails had dissolved and ten years had passed since Mr. DeFrees notified Mr. Greer of his alleged breach of Addendum B and demanded reimbursement of the costs and expenses incurred as a result of the breach, Mr. DeFrees would not release the Deed of Trust. Instead, when Mr. Parker initiated this action, Parkview Trails counterclaimed, seeking to foreclose on the Deed of Trust as a result of Mr. Greer's alleged breach of contract from **more than ten years prior**.

**E. <u>The Parkers' Motion for Summary Judgment</u>.**

Because Parkview Trails' attempt to recover on a long-expired contract was so clearly in contravention of Washington law, the Parkers moved for summary judgment both on Mr. Parker's claim to quiet title to the Property and on Parkview Trails' claim to foreclose on the Deed of

[23] *Id.*

[24] CP 70 (¶ 4).

Trust. Mr. Parker's motion for summary judgment was filed on September 13, 2016.

On November 2, 2016, the trial court orally granted the Parkers' motion for summary judgment in open court and on the record; on December 16, 2016, the trial court entered a written order to the same effect (the "Order"). In short, the Order found that the following facts were undisputed, and outlined the resulting conclusions of law:

- Parkview Trails' successor in interest, Columbia Rim Construction, Inc. ("CRC"), and Mr. Greer engaged in a land development transaction in approximately 2001. As part of that deal, Mr. Greer sold land (not the Property) to CRC; to effectuate that sale, Mr. Greer and CRC (who the parties acknowledged would assign its rights to Parkview Trails) entered into the PSA and a number of addenda to that PSA.

- To secure certain obligations of Mr. Greer to Parkview Trails in the land development transaction, Sharon G. Greer, as Trustee of the 1991 Lee Edna Germain Trust executed the Deed of Trust against the Property, in favor of Parkview Trails, on September 19, 2001.

- Mr. Greer and Parkview Trails did and do dispute whether Mr. Greer met his obligations to Parkview Trails under the PSA; in 2002, the parties—and then counsel for the parties—exchanged letters in 2002 about Mr. Greer's obligations under the PSA.

- In 2005, Mr. Greer and Parkview Trails again exchanged letters about their respective obligations under the PSA. Mr. DeFrees' letter of September 30, 2005, reflected that Mr. Greer's performance obligations under the PSA—as well as his alleged failure to perform—were definitively

known to Mr. DeFrees by 2005. In that letter, Mr. DeFrees listed both Mr. Greer's obligations and his belief that Mr. Greer had failed to perform, in great detail.

- Accordingly, the court held that by no later than September 30, 2005, when Mr. DeFrees sent Mr. Greer the letter detailing Mr. Greer's obligations under the PSA and his alleged failure to perform under the PSA, all facts needed to apply to the court for relief were known to Parkview Trails. Further, by at least that date, Parkview Trails had a right to apply to the court for relief. Accordingly, the statute of limitations for breach of the PSA, at the very least, began to run in 2005.

- Since the statute of limitations for breach of the PSA began to run no later than 2005, under RCW 4.16.040(1) the statute of limitations for breach of the PSA expired no later than September 30, 2011. Because of this, the PSA was no longer enforceable after September 30, 2011.

- Finally, under RCW 7.28.300, "[t]he record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien." Because the statute of limitations had long since run on Parkview Trails' Deed of Trust on the Property, Mr. Parker was also granted a decree quieting title in the Property.

**F. <u>Parkview Trails' Motions for Reconsideration and to Compel Discovery</u>.**

After Mr. Parker had filed for summary judgment, and while Mr. Parker's summary judgment motion was pending, Mr. Parker was

served with Parkview Trails' first discovery requests to Mr. Parker.[25] In the same time frame (while the summary judgment motion was pending), Parkview Trails issued subpoenas to title companies First American Title and Fidelity Title. Parkview Trails received documents from First American Title and Fidelity Title on October 31, 2016, and October 24, 2016, respectively.

Mr. Parker served his objections to the first discovery requests in a timely manner, but did not provide substantive responses or documents because of the pending summary judgment motion: in short, all facts necessary to decide the summary judgment motion were in the record and undisputed. So no additional discovery was needed for the trial court to decide Mr. Parker's motion for summary judgment, and producing voluminous documents would have caused Mr. Parker to incur an additional large, unnecessary expense.

Parkview Trails then moved the trial court to compel Mr. Parker to provide substantive interrogatory responses and produce documents. The trial court, however, agreed with Mr. Parker and denied Parkview Trails'

[25] Mr. Parker filed his complaint to quiet title in March 2016, and Mr. Parker issued his first discovery requests to Parkview Trails on April 21, 2016. Mr. Parker's motion for summary judgment was not filed until September 13, 2016.

motion to compel production of documents and responses to interrogatories. The trial court made this ruling on November 2, 2016, the same day that it orally granted Mr. Parker's motion for summary judgment.

Finally, on December 13, 2016, Parkview Trails moved for reconsideration of the trial court's order on summary judgment on the basis that Mr. Greer (who sold Mr. Parker the Property in 2014) had not paid real estate taxes when due in 2010-2013. Parkview Trails alleged that it did not know this until it received discovery responses back from First American Title and Fidelity Title; notably, it did not issue the subpoenas to First American Title and Fidelity Title until October 18, 2016 (the motion for summary judgment was filed on September 13, 2016). Further, the information that Parkview Trails alleged was "newly discovered" had been evident throughout the litigation from public records: online property information records maintained by Clark County—available anytime with the click of a mouse—showed that interest and penalties had been incurred on the Property in tax years 2010-2013. Thus, the information that Parkview Trails argued was "newly discovered" from the title company documents that it could not have

obtained before summary judgment briefing and hearing was and had been part of the public record.

Moreover, Parkview Trails' motion for reconsideration argued that the fact that real estate taxes were delinquent on the Property in 2010-2013 somehow gave it a separate basis to foreclose on the Deed of Trust. But nothing in Parkview Trails' argument or authority explained how anything Parkview Trails had "discovered" about real estate taxes would serve to change the date that its cause of action for breach of the PSA accrued, which the trial court had ruled accrued no later than 2005 and expired in 2011. Once the PSA was no longer enforceable (in 2011), the Deed of Trust had no performance obligation to secure and was not subject to foreclosure. Finally, under the clear terms of the Deed of Trust, delinquent real estate taxes alone simply did not constitute a breach allowing the holder to foreclose.

The trial court did not rule on Parkview Trails' motion for reconsideration. This appeal followed.

## IV. ARGUMENT

### A. The Statute of Limitations for Breach of Contract Expired No Later Than 2011.

#### 1. Summary of Parkview Trails' Argument on Appeal.

On appeal, Parkview Trails argues that the Superior Court erred in granting summary judgment based on expiration of the statute of limitations for breach of contract in two primary ways: a) by ruling that Parkview Trails had notice of all facts needed to sustain an action for breach of contract no later than 2005, such that the statute of limitations on a breach-of-contract action expired in 2011, and b) because the underlying PSA between Parkview Trails and Greer was an installment contract and Parkview Trails did not "accelerate" amounts owed under the PSA; therefore, Parkview Trails argues, performance was not due in 2005.

As to the first, evidence in the record shows that in 2005, Mr. DeFrees told Mr. Greer that he was in breach of the underlying PSA and demanded payment, which Mr. Greer did not make; thus, Mr. DeFrees's own letter shows that he was aware of facts that, if true, were sufficient to sue for breach of contract in 2005. Under blackletter Washington law, the statute of limitations started to run no later than the date of this letter and so expired no later than 2011. Parkview Trails'

argument that a disputed question of fact exists about Mr. Greer's performance under the PSA does not defeat summary judgment because, for purposes of the summary judgment motion only, Mr. Parker agreed to assume that Mr. Greer did breach the PSA.[26] Similarly, Parkview Trails argues that the PSA required it to present Mr. Greer with a "final accounting" before he could be "in default"—thus, before a claim for breach of contract could be had. This argument, as explained more fully below, is wrong for several reasons: (a) the "final accounting" requirement that Parkview Trails relies on is simply fabricated—there is no such requirement in the PSA; (b) Parkview Trails' current revisionist history is in conflict with Mr. DeFrees's 2005 letter that accused Mr. Greer of nonperformance and demanded payment as damages for the nonperformance.

As to Parkview Trails' second argument, the PSA was simply not an installment contract. It was a contract to do a land development deal that required Mr. Greer to obtain certain consents from various agencies so that Parkview Trails could build a subdivision. Examination of the underlying PSA shows that it was not an installment note. When it makes

[26] CP 73.

this argument in its brief, Parkview Trails exclusively cites case law involving deeds of trust that secured promissory notes. That law simply does not apply to a real estate development contract like the PSA between Parkview Trails and Mr. Greer.

2. The Statute of Limitations on Breach of Contract Started to Run No Later Than 2005.

*a. The statute of limitations for breach of contract starts when the breach occurs.*

Under RCW 4.16.040(1), an action on contract must be filed within six years of when it accrued. The statute of limitations for breach of contract begins to run when the breach happens and "is not postponed by the fact that the actual or substantial damages did not occur until a later date." *Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d 534, 538, 392 P.2d 802 (1964). Accordingly, Washington courts hold that when the contract provides that a party is to do something, the statute of limitations starts to run when the breach occurs. In *Taylor*, defendant power company had entered into an agreement with plaintiff to acquire an easement over plaintiff's neighbor's property in order to run power to plaintiff. The agreement was reached in 1940, but the power company did not acquire the easement. Seventeen years later, plaintiff's neighbor would not let the

power company on his property to fix the power line. The plaintiff then sued the power company for breach of contract, but the court held that plaintiff's claim was barred because the six-year statute of limitations for breach of contract had long expired. *Taylor*, 64 Wn.2d at 537-38 (internal citations omitted). In short, it is settled Washington law that the statute of limitations begins to run when the contract is breached—regardless of when damages occurred.

According to the terms of the underlying PSA between Mr. Greer and Parkview Trails, Mr. Greer was to perform under Addendum B by July 1, 2002.[27] While Mr. Greer and Parkview Trails did and do dispute whether Mr. Greer performed under Addendum B, it is immaterial for purposes of summary judgment analysis. Either (1) Mr. Greer performed fully under Addendum B and the Deed of Trust should be released because it is no longer necessary to secure Mr. Greer's performance or (2) Mr. Greer did not perform under Addendum B by July 1, 2002, in which case he breached Addendum B on or shortly after July 1, 2002, and the six-year statute of limitations has long since expired.

[27] CP 55 (¶ 6); CP 57-60; CP 61.

At minimum, it cannot be disputed that Parkview Trails believed that Mr. Greer had breached Addendum B by no later than September 30, 2005, the date of Parkview Trails' letter to Mr. Greer.[28] That letter explicitly stated that Parkview Trails had incurred costs and expenses of more than $1,000,000 as a result of Mr. Greer's failure to perform under Addendum B, demanded reimbursement for the costs and expenses incurred, and stated, "Please provide reimbursement as soon as possible and I will make arrangements to release the subject deed of Trust."[29] Even assuming that Addendum B was not breached until the date of the 2005 letter, the six-year statute of limitations expired on September 30, 2011.

The trial court ruled in its order on summary judgment that Mr. DeFrees's letter of September 30, 2005, "reflected that Mr. Greer's performance obligations under the PSA—as well as his alleged failure to perform—were definitively known to Mr. DeFrees by 2005. In that letter, Mr. DeFrees listed both Mr. Greer's obligations and his belief that Mr. Greer had failed to perform, in great detail."[30] It then concluded that

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[28] CP 55 (¶ 13); CP 66-67.

[29] *Id*.

[30] CP 383 (¶ 4).

by no later than September 30, 2005, when Mr. DeFrees sent Mr. Greer the letter detailing Mr. Greer's obligations under the PSA and his alleged failure to perform under the PSA, all facts needed to apply to the court for relief were known to Parkview Trails.[31] Further, by at least that date, Parkview Trails had a right to apply to the court for relief.[32] Accordingly, the statute of limitations for breach of the PSA, at the very least, began to run in 2005 and expired in 2011.[33] So Parkview Trails had no legal recourse for any alleged breach of Addendum B, including foreclosure of the Deed of Trust, after 2011.

*b. The PSA did not require a "final accounting."*

Parkview Trails argues that the trial court erred "by failing to properly identify the actual default provision of the [PSA]" . . . The precise event of default under the Agreement did not occur until Greer failed to timely pay the <u>final</u> accounting of all costs and fees incurred by Parkview . . ."[34] In short, Parkview Trails argues that it did not issue a

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Brief of Appellant at 26.

"final accounting" to Mr. Greer until 2016[35] and so, according to Parkview Trails' argument, the statute of limitations could not have started to run until after the "final accounting" was issued.[36] This argument is flawed: it relies entirely on a "final accounting" requirement when none exists in the PSA.

Instead, the two default provisions read the same, as follows:

> In the event the interest carry total of $20,000.00 per month and Columbia Rim's costs and fees exceed the $320,000.00 holdback, Columbia Rim shall provide an accounting of the number of months needed to obtain the final Consent(s) and its costs and fees in pursuing the same to Greer. Greer shall have fourteen (14) days to pay the amount that exceeds $320,000.00 up to a maximum of $260,000.00 to Columbia Rim in cash. If Greer fails to make such payment, Greer shall be in default of this agreement and Columbia Rim may pursue its remedies under the Lot 1 Deed of Trust.
>
> . . . .
>
> If Columbia Rim's costs and fees exceed $320,000.00 but are less than $580,000.00 Columbia Rim shall provide an accounting of its costs and fees to Greer. Greer shall have ten (10) days to pay the amount that exceeds $320,000.00 up to a maximum of $260,000.00 to Columbia Rim in cash. If Greer fails to make such payment, Greer shall be in default of this agreement and Columbia Rim may pursue its remedies under the Lot 1 Deed of Trust.[37]

As can be seen, Addendum B states only that Columbia Rim (Parkview Trails) "shall provide an accounting." Neither default provision states that a final accounting need be designated before Mr. Greer's

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[35] Coincidentally, Mr. Parker filed the quiet title action on March 9, 2016, and Parkview Trails alleges that its "final accounting" was issued March 31, 2016—a "final accounting," which is not labeled or identified as such and that Mr. Greer did not see until Parkview Trails' Response to his motion for summary judgment was filed.

[36] Brief of Appellant at 26.

[37] CP 55 (¶ 5); CP 58-59.

obligation to pay came due, nor is there a special or designated procedure for Parkview Trails to issue the accounting. Both default provisions state only that "an accounting" will be provided and that Mr. Greer would then have 14 and 10 days, respectively, to pay "the amount that exceed[ed] $320,000.00 up to a maximum of $260,000.00."

Accordingly, indisputably and in accordance with the PSA, Mr. Greer's attorney wrote to Parkview Trails on August 25, 2005, stating:

> Pursuant to the terms of the agreement of June 16, 2001, and subsequent amendments, the balance of funds to Mr. Greer, less your environmental costs as set forth in the agreement, are now due and owing.
>
> Please forward me documentation of these costs so that we may verify the accounting.[38]

In response, Parkview Trails sent a letter back to Mr. Greer's attorney that detailed (albeit with no documentation) the costs that had allegedly been incurred to date, and concluded: "In summary the total costs incurred to date is in the amount of $1,047,744.70 [sic] **Please provide reimbursement as soon as possible and I will make arrangements to release the subject deed of Trust.**"[39]

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[38] CP 111 (¶ 8); CP 139.

[39] CP 56 (¶ 13); CP 66-67.

In short: (1) the PSA stated that Parkview Trails would provide "an accounting" after which Mr. Greer had, at maximum, 14 days to make payment;[40] (2) Mr. Greer, via counsel, requested "an accounting" **in 2005**;[41] (3) Mr. DeFrees responded to that request by providing an itemized list of costs incurred under the PSA and demanding payment "as soon as possible," after which he would "release the subject deed of Trust";[42] and (4) Mr. Greer did not respond to Mr. DeFrees's demand in any way and certainly did not provide payment to Parkview Trails within 14 days of Mr. DeFrees's demand.

Regardless of what other factual disputes surround the PSA, including whether the parties performed under it and whether Mr. Greer owed Parkview Trails anything at all, the facts in the preceding paragraph cannot be disputed. A demand for payment was made under the PSA and payment was not provided within the contractually provided time frame. If money was in fact owed by Mr. Greer, then he breached the PSA no later than 14 days after receipt of Parkview Trails' demand, and the statute

[40] CP 55 (¶ 5); CP 58-59.

[41] CP 111 (¶ 8); CP 139.

[42] CP 56 (¶ 13); CP 66-67.

of limitations started to run in October 2005. **It is now more than 11 years after the statute of limitations started to run and more than 5 years after it expired.**

Parkview Trails tries to avoid the expired statute of limitations by arguing, "The September 30, 2005 letter was not a final accounting of the costs and fees nor did it indicate that Parkview had completed the process of obtaining the Consents and the approvals for mitigation."[43] As the contractual language provided above makes clear, there was no "final accounting" requirement. The only requirement was that once "an accounting" was provided, Mr. Greer had 14 and 10 days, respectively, to provide payment. If payment was ever due and owing, he did not provide it; at that moment in October 2005, breach occurred and the statute of limitations consequently began to run.

Thus, whether the parties met their obligations under the PSA (which Parkview Trails and Mr. Greer clearly do dispute) is immaterial to Mr. Parker's motion for summary judgment: the dispute between Parkview Trails and Mr. Greer over obligations came to a head in 2005, when Parkview Trails outlined the amount it deemed owing from

[43] Brief of Appellant' at 25.

Mr. Greer under the PSA. At that time, Parkview Trails told Mr. Greer that if he "reimbursed" Parkview Trails for $1,047,744.70, Parkview Trails would release the Deed of Trust.

In short, as the trial court held, "Mr. Greer's performance obligations under the PSA—as well as his alleged failure to perform—were definitively known to Mr. DeFrees by 2005. In that letter, Mr. DeFrees listed both Mr. Greer's obligations and his belief that Mr. Greer had failed to perform, in great detail."[44] Under blackletter Washington law, the statute of limitations starts to run when the facts supporting breach are known; here, Parkview Trails knew the facts supporting Mr. Greer's alleged breach no later than 2005. The statute of limitations expired in 2011, rendering the Deed of Trust unenforceable after 2011.

*c. The underlying PSA is not an installment contract.*

Parkview Trails tries to avoid the well-established Washington law outlined above by making a strained argument that the PSA was an "installment contract," and asking this Court to apply rules from

[44] CP 383 (¶ 4).

inapposite cases that dealt exclusively with deeds of trust securing payment of promissory notes. Black's Law Dictionary defines "installment contract" as "[a] contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted."[45] The PSA was not an installment contract; a cursory review of the document[46] makes that clear: Mr. Greer did not borrow money from Parkview Trails that it would pay off over time in set, separate intervals. Thus, the case law cited by Parkview Trails is not applicable.

What Parkview Trails argues, in actuality, is that the statute of limitations does not begin to run on a breach-of-contract claim until all damages are incurred and every obligation under the contract is due. This is an argument that Washington courts have expressly rejected. As our Supreme Court stated in *Taylor*, "[r]unning of the statute of limitations against the breach of contract . . . is not postponed by the fact that the actual or substantial damages did not occur until a later date." 64 Wn.2d at 538. No Washington court has overruled this holding, and in fact, this

[45] Black's Law Dictionary 395 (10th ed. 2014).

[46] CP 57-60.

exact language was quoted with approval by our Supreme Court in *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

Further, there are strong policy and practical reasons that this is the law. Statutes of limitations serve the overriding purpose of protecting defendants and courts from stale claims when plaintiffs have slept on their rights. *See In re Estates of Hibbard,* 118 Wn.2d 737, 745, 826 P.2d 690 (1992) (for a court to compel a party to answer a stale claim is in itself a substantial wrong because society as a whole benefits when it can be assured that a time comes when one is freed from the threat of litigation). If claims did not accrue until the full extent of damages were known, claims could be pending indefinitely, and this would frustrate the purpose of preventing stale claims. Under *Taylor* (and many other cases), it is a fundamental proposition of Washington law that if not all damages are known at the time of trial, the finder of fact can account for that in its damages award. Otherwise, claims would and could pend indefinitely.

Here, the alleged breach of contract initially occurred no later than 2005 (and likely sooner), and Parkview Trails did absolutely nothing about it; it simply sat on its hands until Mr. Parker filed this action to quiet

title to his Property, more than ten years later. This is exactly the scenario that statutes of limitations are designed to prevent. Mr. Parker is entitled to summary judgment on the basis that the statute of limitations underlying the obligation clouding his title has long since run.

*d. Because the underlying PSA is unenforceable, Mr. Parker is entitled to quiet title.*

Under RCW 7.28.300, "[t]he record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien." As explained above and as determined by the trial court, the statute of limitations has long since run on enforcement of Parkview Trails' Deed of Trust on the Property. Accordingly, under RCW 7.28.300, Mr. Parker is entitled to a decree quieting title in the Property, and he asks this Court to affirm the trial court's ruling granting him summary judgment on his claim to quiet title.

### B. Parkview Trails' Motion for Reconsideration Should Not Be Granted.

After the Superior Court granted Mr. Parker's motion for summary judgment, Parkview Trails moved for reconsideration on the basis of newly discovered evidence under CR 59(a)(4). The "newly discovered evidence" that Parkview Trails had obtained consisted of documents showing that from approximately 2010 to 2013—before selling the Property to Mr. Parker—Mr. Greer did not pay property taxes on the Property.

Parkview Trails alleges that it did not know about the nonpayment of taxes until it received discovery responses back from First American Title and Fidelity Title; notably, it did not issue the subpoenas to First American Title and Fidelity Title until October 18, 2016 (the motion for summary judgment was filed on September 13, 2016). Further, the information that Parkview Trails alleges was "newly discovered" is evident from public records: the online property information records maintained by Clark County show that interest and penalties were incurred on the Property in tax years 2010-2013. Thus, the information that Parkview Trails argues it obtained from the title company documents,

which it could not have obtained before summary judgment briefing and hearing, is and has been part of the public record.[47]

Moreover, Parkview Trails' motion for reconsideration argued that the fact that real estate taxes were delinquent on the Property in 2010-2013 somehow allowed it a separate basis to foreclose on the Deed of Trust. But nothing in Parkview Trails' argument or authority, as explained in greater detail below, explains how anything Parkview Trails has "discovered" about real estate taxes would serve to change the date that its

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[47] Under CR 59(a)(4), the court may reconsider its prior decision (among other bases) if there is "[n]ewly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." Thus, Parkview Trails is not entitled to reconsideration under the clear language of the rule: it could have obtained the documents well in advance of the summary judgment hearing (the complaint was filed six months in advance of the summary judgment motion, and Mr. Parker issued his first discovery requests on April 21, 2016) if it had exercised reasonable diligence, and it could even have obtained the information that it relies on **from the public record**. This basis alone was sufficient for the trial court to deny Parkview Trails' motion for reconsideration.

For example, when a party sought reconsideration on the grounds of "newly discovered evidence" that came to light via a deposition taken after a motion for summary judgment—evidence that the party argued was grounds for reversing the trial court's grant of summary judgment—the appellate court affirmed the trial court's decision to deny the motion for reconsideration in part because the moving party had not showed why the new evidence "could not have been discovered previously." *Matthews v. Island Landmarks*, 193 Wn. App. 1014, 2016 WL 1306655, at *8 (2016) (unpublished opinion cited as persuasive, nonbinding authority).

In short, Parkview Trails could have consulted the public record **or** subpoenaed the title insurance companies at issue anytime between the filing of the complaint in March 2016 and filing its response to summary judgment in October 2016, but it chose not to. The clear language of CR 59(a)(4), requiring the party to show that it "could not with reasonable diligence" have obtained the discovery earlier is designed to prevent exactly this situation.

cause of action for breach of the PSA accrued: as the trial court ruled, that cause of action accrued no later than 2005 and expired in 2011. Once the PSA was no longer enforceable (2011), the Deed of Trust had no performance obligation to secure. Finally, under the clear terms of the Deed of Trust—again, as explained in greater detail below—no breach allowing for foreclosure occurred.

Nothing in the "newly discovered evidence" outlined in Parkview Trails' motion for reconsideration acted to extend the life of the PSA, which expired in 2011. Nothing in the "newly discovered evidence" showed a breach of the Deed of Trust that would have allowed Parkview Trails an independent basis for foreclosure. In short, nothing in Parkview Trails' motion for reconsideration presented an issue that should have caused the Superior Court to change its decision, and the Superior Court acted well within its discretion in not granting the motion.

1. <u>After the PSA Expired in 2011, the Deed of Trust Had No Enforceable Performance Obligation to Secure</u>.

A deed of trust, by definition, secures a separate contractual obligation. Each is a separate remedy of the creditor if the borrower defaults on its obligations. *Edmundson v. Bank of Am.*, 194 Wn. App.

920, 927, 378 P.3d 272 (2016). Because the two obligations are separate, there is no authority for the proposition that—once the underlying contractual obligation has expired—subsequent breach of the deed of trust tolls or extends an expired statute of limitations. Once the underlying contractual obligation has expired, the deed of trust has nothing left to secure.

Here, the question on summary judgment was when Parkview Trails' cause of action against Mr. Greer accrued. As explained in detail above, Washington law is clear: the statute of limitations begins to run when the claim has "accrued." RCW 4.16.005. As Mr. Parker showed and the trial court agreed, that cause of action accrued no later than 2005, and expired no later than 2011. Thus, any obligation under the PSA has not been enforceable since 2011. Accordingly, any ability of Parkview Trails to foreclose on the Deed of Trust based on breach of the PSA expired in 2011, as the Superior Court ruled.

The question for reconsideration, then, was whether anything that Parkview Trails "discovered" operated to change the accrual date of its claim on the PSA. Parkview Trails argues that Mr. Greer may have failed to comply with the terms of the Deed of Trust in 2010-2013 because he

was delinquent on certain property taxes.[48] But that alleged failure does not serve, as a matter of law, to toll or extend the statute of limitations on the separate, underlying PSA. Because an alleged violation of the Deed of Trust in 2010-2013 is legally separate from Parkview Trails' claim against Mr. Greer for breach of the PSA, nothing that Parkview Trails alleged happened in 2010 affects the accrual date on Parkview Trails' breach claim against Mr. Greer (no later than 2005) or the date that Parkview Trails' cause of action for breach of the PSA began to run (no later than 2005). Accordingly, the PSA expired no later than 2011, and from that date forward the Deed of Trust no longer secured any obligation of the PSA.

2. The Alleged Failure to Pay Taxes Never Gave Parkview Trails the Separate Ability to Foreclose the Deed of Trust.

Parkview Trails also argues that under the Deed of Trust, Mr. Greer had an obligation to pay all real property taxes when due; therefore, its theory goes, Mr. Greer was in default under the Deed of Trust in 2010 (and each subsequent missed tax payment) and Parkview Trails could, upon each missed tax payment, foreclose on the Deed of

[48] Notably, the breach that Parkview Trails alleges was cured before Parkview Trails could ever have foreclosed on the Deed of Trust on that basis, which is explained more fully below.

Trust. This argument is fatally flawed, however, because under the terms of the Deed of Trust, a missed tax payment did not give Parkview Trails the right to foreclose.

*a. Parkview Trails never made any tax payments on Mr. Greer's behalf.*

As a starting point, Parkview Trails' argument relies on the idea that the Deed of Trust is essentially an installment note; this is simply wrong. First, the "installment payments" that Parkview Trails alleged were due **were not due to Parkview Trails, but to the local government**. Second, under the Deed of Trust, if Mr. Greer defaulted in payment of taxes, Parkview Trails had only a right to perform—i.e., pay the taxes on Mr. Greer's behalf—and then only at this point: "all sums so expended shall be payable on demand."

> 4.2 Beneficiary's and Trustee's Right to Perform. Upon the occurrence of any Event of Default, Beneficiary or Trustee, but without the obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligations hereunder, may: make any payments or do any acts required of Grantor in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon the Property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien in accordance with the following paragraph; and in exercising any such powers, pay necessary expenses, employ counsel and pay a reasonable fee therefor. All sums so expended shall be payable on demand by Grantor, be secured hereby and bear interest at the greater of the rate specified in the Note or the rate of twelve percent (12%) per annum from the date advanced or expended until repaid. [49]

[49] CP 131.

Thus, to the extent that Mr. Greer could have owed Parkview Trails anything because of a default for failure to pay real estate taxes, it was not—under the plain language of the Deed of Trust—unless and until Parkview Trails (1) paid the taxes on Mr. Greer's behalf (which it had the right to do, **but not an obligation to do**), and (2) made demand to Mr. Greer for repayment. It cannot be disputed that **neither event occurred**. Thus, Mr. Greer was never obligated to make any payment to Parkview Trails arising from an alleged breach of the Deed of Trust: Parkview Trails never made **any** payment on Mr. Greer's behalf.

*b. Mr. Greer Had a Right to Cure, and Did Cure, Events of Default for Nonpayment Obligations.*

Just as Parkview Trails ignored the terms of the Deed of Trust with respect to when amounts actually became due and owing to it because of failure to pay real estate taxes, Parkview Trails has also ignored the fact that under the Deed of Trust, Mr. Greer had a right to cure events of default for nonpayment obligations. Paragraph 4.3, "Remedies," reads:

4.3 Remedies. Upon the occurrence of any Event of Default, Beneficiary may at any time after five (5) days written notice of a payment default, and after twenty (20) days written

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notice and opportunity to pursue a cure of a nonpayment default, at its option and in its sole discretion, declare all Secured Obligations to be immediately due and payable; provided, if any provision in the Purchase Agreement provides for the automatic acceleration of the indebtedness evidenced by the Purchase Agreement upon the occurrence of any act or event, such provision shall control and preempt any contrary provision herein. Beneficiary may also do any or all of the following:

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Paragraph 4.3(b) allowed the beneficiary (Parkview Trails) to foreclose via court action on the Deed of Trust. Thus, the Deed of Trust could be foreclosed only "after twenty (20) days written notice and opportunity to pursue a cure of a nonpayment default." As explained above, amounts could become due and owing to Parkview Trails for default of real estate taxes only if Parkview Trails (1) paid the real estate taxes, and (2) made demand for payment to Mr. Greer. Neither event happened. Accordingly, to the extent that Mr. Greer's failure to pay real estate taxes was an event of default, it was a "nonpayment default." Under

[50] CP 131-32.

the plain language of the Deed of Trust, Parkview Trails could not foreclose on that basis unless and until it gave Mr. Greer 20 days' written notice and an opportunity to cure the default. Here, it cannot be disputed that Mr. Greer did not receive 20 days' written notice of default for failure to pay real estate taxes (nor did Mr. Parker). Regardless, the real estate taxes were paid, such that any alleged default was cured, long before Parkview Trails attempted to foreclose on the Deed of Trust.

Because the alleged event of default was long ago cured (the ability to cure Mr. Greer was guaranteed under the terms of the Deed of Trust), foreclosure on the basis of failure to pay real estate taxes is simply not allowed now, years after the "default" was cured. Thus, the alleged default in question does not provide a basis for Parkview Trails to foreclose on the Deed of Trust in 2016—years after the event potentially triggering default was **cured**.

The Superior Court was well within its discretion when it did not grant Parkview Trails' motion for reconsideration.

### C. Parkview Trails' 56(f) Motion Was Properly Denied.

Parkview Trails also assigns error to the trial court's denial of its motion under CR 56(f), which provides:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Notably, this rule "**allows** the court to order a continuance for further discovery when 'it appear[s] from the affidavits of a party opposing the [summary judgment] motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition.'" *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 628-29, 218 P.3d 621 (2009) (bold added) (quoting CR 56(f)). And "[a] trial court may deny a motion for a continuance when: (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 71, 358 P.3d 1204 (2015), *rev. denied* 184 Wn.2d 1036, 379 P.3d 953 (2016) (internal quotation marks and citations omitted). The trial court's decision is reviewed for an abuse of discretion. *Id.*

Here, Parkview Trails' motion was properly denied both because (1) it did not have a good reason for its delay in obtaining the evidence, and (2) the potential evidence it identified would not raise a genuine issue of fact sufficient to defeat summary judgment.

1. No Reason for Delay.

Tellingly, Parkview Trails' brief skips over the fact that for application of CR 56(f) to be proper, the party seeking a continuance must establish that it had a good reason for its delay in obtaining the evidence. Here, Parkview Trails has no good reason. Mr. Parker's complaint was filed on March 9, 2016.[51] Mr. Parker issued his first discovery requests on April 21, 2016. The Parkers' motion for summary judgment was not filed until September 13, 2016,[52] almost six months later. In short, Parkview Trails had six months to obtain discovery while the action pended, but Mr. Parker was not served with any discovery until after the Parkers filed for summary judgment. Similarly, Parkview Trails did not seek discovery from Mr. Greer until after the Superior Court made its oral ruling on

[51] CP 1-6.

[52] CP 72-80.

summary judgment, although in its brief it now argues that more discovery is needed from him as well.

Merely choosing not to seek discovery does not constitute a "good reason" for delay. The trial court properly denied Parkview Trails' CR 56(f) motion on this basis alone.

2. The Identified Evidence Does Not Create a Fact Issue Sufficient to Defeat Summary Judgment.

Parkview Trails argues that the discovery it sought from Mr. Parker (again, it also refers to evidence that it would seek from Mr. Greer, although no discovery requests to Mr. Greer were ever issued) would have shed light on Parkview Trails' affirmative defenses of "laches, waiver, equitable estoppel and unclean hands."[53] But nothing that Parkview Trails cites establishes that the affirmative defenses it pleaded, all equitable, can be applied to toll a statute of limitations for breach of contract as against a third party whose allegedly "bad acts" occurred years after the statute of limitations had expired.

[53] Brief of Appellant at 34.

In this case, as against Mr. Parker,[54] Parkview Trails sought discovery about "the fact that Parker only paid Greer $30,000.00 to purchase property, which had a tax assessed value of $391,800."[55] But Mr. Parker's purchase occurred in 2014, approximately three years after the statute of limitations for breach of the PSA had occurred, and Mr. Parker was not a party to the PSA. Parkview Trails has cited no authority—nor could it—that Mr. Parker's 2014 acts could toll the statute of limitations on Parkview Trails' cause of action for breach of the PSA.

Further, if documents did exist that would support Parkview Trails' affirmative defense of equitable tolling, Parkview Trails would already have that evidence: the essence of equitable tolling is that the party seeking to enforce a statute of limitations (a) engaged in "bad faith, deception, or false assurances," (b) while the other party "exercise[d] . . . diligence," but (c) missed the statute of limitations, (d) and justice prevents the court from enforcing the statute of limitations against the

[54] As against Mr. Greer, the issue is simply moot: Parkview Trails did not issue discovery requests to Mr. Greer until after the Superior Court had already made its oral ruling on summary judgment.

[55] Brief of Appellant at 35.

innocent party. *In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672, 676 (2008) (internal citations omitted).

Here, neither what Mr. Parker knew about the Property nor what he paid for it could support the elements of equitable tolling. Parkview Trails has identified no potential evidence that would support an equitable tolling defense; if such evidence did exist, Parkview Trails would know about it because—by definition—it would have been an act of "bad faith, deception, or false assurances" **done to Parkview Trails**. In short, Parkview Trails would not need to get that information from another party (and certainly not from Mr. Parker) because it would already be aware of the act, as that act kept it from filing for breach of contract within the statute of limitations. If a bad act prevented Parkview Trails from asserting its claim for breach of contract, Parkview Trails would know that. The undisputed facts in the record show the opposite: that Parkview Trails had the information it needed to file for breach of contract in 2005, yet did not act. The doctrine of equitable tolling does not apply.

In sum, the trial court's denial of Parkview Trails' CR 56(f) motion was well within the trial court's discretion, and should not be disturbed on appeal.

### D. Parkview Trails' Motion to Compel Was Properly Denied.

Parkview Trails' motion to compel production of documents and responses to interrogatories was properly denied for the same reason that its motion for a continuance under CR 56(f) was properly denied: the discovery it sought, Parkview Trails alleged, could have proved its affirmative defenses to enforcement of the statute of limitations. But Mr. Parker's involvement with the Property began three years after the statute of limitations on a breach-of-contract claim had expired. Nothing in Washington law provides that a breach-of-contract claim, long expired, can be "brought back to life" by allegedly inequitable behavior that occurred years after the statute of limitations at issue had expired. Even if Parkview Trails had received the discovery it sought, the discovery it identified in its motion to compel would not have affected the date that its claim for breach of the PSA started to run. Similarly, if Parkview Trails were to argue that evidence could exist which it cannot identify but that could prove its defense of equitable tolling, that argument must fail: if another party's bad act had prevented Parkview Trails from filing for breach of contract before the statute of limitations expired, Parkview

Trails would—by the definition of equitable tolling—already know about it.

Because of this, if Parkview Trails' motion to compel had been granted, the only goal achieved would have been further delay and expense to the parties while the litigation dragged on. The trial court's denial of the motion to compel is to be disrupted on appeal only if the trial court abused its discretion. *Clarke v. State Attorney Gen.'s Office*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006). Here, the Superior Court's denial of Parkview Trails' motion to compel was based on reasonable grounds and was well within the Superior Court's discretion: the discovery sought was legally irrelevant to when the claim for breach of the PSA expired. This decision should not be disturbed on appeal.

## V. CONCLUSION

By its own statement, Parkview Trails believed that Mr. Greer had failed to perform under the PSA by 2005. Parkview Trails demanded damages allegedly resulting from Mr. Greer's breach in 2005. Upon receipt of payment, Parkview Trails would remove its Deed of Trust from the Property. But Mr. Greer did not pay, and Parkview Trails did nothing until 2016—after Mr. Parker, a third party, filed an action to quiet title and

remove Parkview Trails' expired encumbrance from the Property. As the Superior Court correctly recognized, Washington law does not allow this: a party may not sit on its rights indefinitely, but must act within the applicable statute of limitations. Here, Parkview Trails did not do so. Its ability to recover for breach of the PSA, and so to foreclose on the Deed of Trust, has long since expired. Because of this, the Superior Court granted the Parkers' motion for summary judgment on Mr. Parker's claim to quiet title and on Parkview Trails' claim to foreclose on the Deed of Trust.

For the reasons outlined above, the Parkers ask this Court to affirm the Superior Court's decision in the entirety.

DATED this 24th day of October, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing CORRECTED BRIEF OF RESPONDENTS with the State Court Administrator by using the Washington Appellate eFiling system on October 24, 2017.

I further certify that I electronically served the foregoing CORRECTED BRIEF OF RESPONDENTS upon the counsel listed below by using the Washington Appellate eFiling system on October 24, 2017:

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## MILLER NASH GRAHAM & DUNN LLP

## October 24, 2017 - 12:55 PM

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|---|---|
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| **Appellate Court Case Number:** | 50007-8 |
| **Appellate Court Case Title:** | Geoffrey Parker, et al Respondents v Parkview Trails, LLC, Appellant |
| **Superior Court Case Number:** | 16-2-05124-7 |

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